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No. 98-2003

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

DENNIS HOFFMAN and DANIEL LEE WILSON
Petitioners,

vs.

KENDALL BALLEW, sheriff of LeFlore County; HENRY WELLS and RICHARD ENTMEIRER, duly appointed and acting deputy sheriffs of LeFlore County; TOMMY CALDWELL, a reserve officer of LeFlore County sheriff's office; PAT BOZARTH, day jailer of LeFlore County jail; JIM SHINAULT, night jailer of LeFlore County jail; and BOARD OF COUNTY COMMISSIONERS, LeFlore County, Oklahoma
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma

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BRIEF IN OPPOSITION OF PARTIES IN INTEREST, DEFENDANTS IN UNDERLYING LAWSUITS

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QUESTIONS PRESENTED

In their Petition for a Writ of Certiorari, Petitioners, Plaintiffs in the underlying lawsuits (hereinafter "Plaintiffs"), in essence, state that the question presented in this appeal concerns the application of the Fourteenth Amendment to the disqualification of a state district judge. Additionally, Plaintiffs are seeking review of a decision of the Oklahoma Supreme Court. However, these two facts are incongruent. Based upon the underlying lawsuit and Plaintiffs' appeal to the Oklahoma Supreme Court, the question to be presented is simply whether District Judge George H. McBee of LeFlore County, Oklahoma, should be disqualified from the underlying lawsuit. As such, the question presented to the Court involves a question of purely state law and is improper for this Court's consideration.

PARTIES TO THE APPEAL

The parties in the appeal to the Oklahoma Supreme Court are as follows:

Petitioners: Dennis Hoffman and Daniel Lee Wilson

Respondent: The Hon. George H. McBee
District Judge, LeFlore County,
Oklahoma

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JURISDICTION

Plaintiffs contend that jurisdiction is sought pursuant to 28 U.S.C. 1257 (a). Section 1257 (a) provides, in pertinent part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Plaintiffs do not question a treaty or statute of the United States, nor do Plaintiffs question the validity of a State statute. Rather, Plaintiffs attempt to establish jurisdiction by interjecting the Fourteenth Amendment into an issue relating to state

law. As more fully discussed in Respondents', Defendants to the underlying action (hereinafter "Respondents"), Argument, Plaintiffs may not properly invoke this Court's jurisdiction based upon the underlying lawsuits and appeal to the Oklahoma Supreme Court.

CONSTITUTIONAL PROVISIONS

There are no "constitutional provisions, treaties, statutes, ordinances [or] regulations which the case involves." Sup. Ct. R. 14 (1) (f).

STATEMENT OF THE CASE

Plaintiffs filed an Application to Assume Original Jurisdiction and Petition for Writ of Mandamus in the Oklahoma Supreme Court to challenge LeFlore County District Court Judge McBee's denial of Petitioners' Motion to Disqualify in Hoffman v. Ballew, et al., District Court of LeFlore County, Oklahoma, Case No. CJ-98-616; Wilson v. Ballew, et al., District Court of LeFlore County, Oklahoma, Case No. CJ-98-650; and Wilson v. Ballew, et al., District Court of LeFlore County, Oklahoma, Case No. CJ-98-679. Plaintiffs alleged that District Judge George H. McBee should be disqualified from hearing their causes because he is, generally speaking, an interested party. The Oklahoma Supreme Court denied Plaintiffs' Petition for Writ of Mandamus.

ARGUMENT

Plaintiffs' entire theory upon which disqualification is sought centers around Okla. Stat. tit. 57, §§ 47, 48, 49, 51 and 55. (See Appendix "C," Plaintiffs' Petition for a Writ of Certiorari). No constitutional questions have been presented. Additionally, no final judgment has been rendered in the underlying cases. In any event, the statutory provisions relied upon by Plaintiffs are insufficient to establish that LeFlore County District Judge McBee has an interest in the subject matter. Moreover, no evidence has been presented to show bias or prejudice on the part of the Judge.

PROPOSITION I

NO CONSTITUTIONAL QUESTION HAS BEEN PRESENTED

Rule 10 of the United States Supreme Court Rules provides three situations in which a petition for writ of certiorari will be granted. The first situation, (a), is clearly inapplicable because a United States court of appeals has not rendered a decision in this case. The other situations are also inapplicable due to the fact that no important federal questions

have been decided (although, the three situations listed in Rule 10 "neither control[ ] nor fully measur[e] the Court's discretion." Sup. Ct. R. 10.

The United States Supreme Court has had occasion to address situations in which review is sought of a state court decision. In Braxton v. U.S., 500 U.S. 344, 347, 111 S. Ct. 1854, 1857, 114 L. Ed. 2d 385 (1991), the Court stated the main purpose for using certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." The Court in Leavitt v. Jane L., 116 S. Ct. 2068, 2072, 135 L. Ed. 2d 443 (1996), stated, "we do not ordinarily grant petitions for certiorari solely to review what purports to be an application of state law." The Court in Leavitt further suggested that petitions for certiorari should be granted "where the alternative is allowing blatant federal-court nullification of state law." Leavitt at 2072. This Court has set forth specific requirements for reviewing state court judgments when no federal court has been involved. Such review may only be entertained when the

state court bases its decision on federal law. Illinois v. Rodriguez, 497 U.S. 177, 182, 110 S. Ct. 2793, 2798, 111 L. Ed. 2d 148 (1990). Even still, the decision must have been dependent on federal law and not independently supported by state law:

> In Coleman v. Thompson, 501 U.S. 722, 729, 111 S. Ct. 2546, 2553, 115 L. Ed. 2d 640 (1991), we reaffirmed that this Court "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." . . . We in fact lack jurisdiction to review such independently supported judgments on direct appeal: since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory.

Lambrix v. Singletary, 117 S. Ct. 1517, 1522 (1997) (citing Herb v. Pitcairn, 324 U.S. 117, 125-26, 65 S. Ct. 459, 462-64, 89 L. Ed. 2d 789 (1945)). This rule requiring a decision dependent upon a federal question "applies whether the state

law ground is substantive or procedural." Coleman v. Thompson, 501 U.S. 722, 729, 111 S. Ct. 2546, 2553-54, 115 L. Ed. 2d 640 (1991).

The Supreme Court's justification for not reviewing decisions of state law have also been expressed in the opinions addressing certiorari review. In Michigan v. Long, 463 U.S. 1032, 1039, 103 S. Ct. 3469, 3475, 77 L. Ed. 2d 1201 (1983), the Court reasoned, "[t]he process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar." Further, the Court in Schad v. Arizona, 501 U.S. 624, 636, 111 S. Ct. 2491, 2499, 115 L. Ed. 2d 555 (1991), referred to the "fundamental principle that we are not free to substitute our own interpretations of state statutes for those of a state's courts." Neither the principles behind certiorari review, nor the applicable rules that govern the Supreme Court's appellate jurisdiction provide support for Plaintiffs' position.

Plaintiffs' sole justification for invoking the jurisdiction of the Court is premised upon the contours of the Fourteenth

Amendment. Indeed, the Court has indicated that a judge's refusal to disqualify may violate the Due Process Clause of the Fourteenth Amendment. Bracy v. Gramley, 520 U.S. 899, 904-05, 117 S. Ct. 1793, 1797, 138 L. Ed. 2d 97 (1997). However, the Fourteenth Amendment requires a "'fair trial in a fair tribunal,' before a judge with no actual bias against the defendant or interest in the outcome of his particular case." Id., citing Withrow v. Larkin, 421 U.S. 35, 46, 95 S. Ct. 1456, 1464, 43 L. Ed. 2d 712 (1975). Furthermore, of particular importance to the present matter, the Court in Bracy noted:

> Of course, most questions concerning a judge's qualifications to hear a case are **not** constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828, 106 S. Ct. 1580, 1588-1589, 89 L. Ed. 2d 823 (1986). Instead, these questions are, in most cases, answered by **common law, statute, or the professional standards of the bench and bar**.

Id., 520 U.S. at 904, 117 S. Ct. at 1797. (Emphasis added).

In the present case, no federal question has been presented. In fact, the only constitutional reference made by Plaintiffs in their Brief in Support of Petition for Writ of Mandamus to the Oklahoma Supreme Court was unsupported by fact or by law. Plaintiffs' argument in support of Judge McBee's disqualification was premised upon provisions of Oklahoma Statutes. Furthermore, Plaintiffs' rights under the Fourteenth Amendment have not been violated due to the fact that no final judgment has been entered in the underlying case. See generally Pittsburgh v. Simmons, 729 F. 2d 953, 954 (3rd Cir. 1984) (citing Green v. Murphy, 259 F. 2d 591, 594 (3rd Cir. 1958)(en banc)) (A judge's refusal to recuse is only reviewable after final judgment).

PROPOSITION II

THERE ARE NO FACTS OR AUTHORITY WHICH WOULD DICTATE LEFLORE COUNTY DISTRICT JUDGE MCBEE'S DISQUALIFICATION

Plaintiffs argue that certain statutory provisions regarding county jails operate to create an interest in lawsuits

against county jails on the part of a district judge. Plaintiffs even go so far as to suggest that the statutory provisions heighten a district judge's role in government to that of the executive branch. Plaintiffs' arguments are without merit and fail to support their claim under the applicable standards concerning disqualification.

A trial court's decision not to disqualify a judge will only be reversed upon evidence of a "clear abuse of discretion." Graham v. Graham, 434 P. 2d 245, 246 (Okla. 1967); See also T.R.M. v. State, 596 P. 2d 902, 905 (Okla. Crim. App. 1979) (citing Lemmon v. State, 538 P. 2d 596 (Okla. Crim. App. 1975). Indeed, the decision is "addressed to the trial court's sound discretion." Lemmon, at 601.

Courts have required judges to carefully consider whether or not to disqualify in a proceeding. In Johnson v. Board of Governors of Registered Dentists of State of Okla., 913 P. 2d 1339, 1348 (Okla. 1996), the court stated, "[w]hen circumstances and conditions surrounding litigation are of such a nature that they might cast doubt and question as to the

impartiality of any judgment the trial judge may pronounce, said judge should certify his disqualification." This standard is further addressed in the Code of Judicial Conduct, Canon 3 (E), Okla. Stat. tit. 5, Ch. 1, App. 4, which provides:

> (1) A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;
>
> (c) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject

> matter in controversy or has an interest more than de minimis that could be substantially affected by the proceeding;
>
> (d) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person;
>
> (I) is a party to the proceeding, or an officer, director or trustee of a party;
>
> (ii) is acting as a lawyer in the proceeding;
>
> (iii) is known by the judge to have an interest more than de minimis that could be substantially affected by the proceeding;
>
> (iv) is to the judge's knowledge likely to be a material witness in the proceeding.

However, an application to disqualify a judge cannot be supported by mere conclusions and statements of opinion. Dowell v. Hall, 185 P. 2d 232, 235 (Okla. Crim. App. 1947) (citing Pruitt v. State, 70 P. 2d 130 (Okla. Crim. App. 1937); see also T.R.M. v. State, 596 P. 2d 902, 905 (Okla. Crim. App. 1979).

Plaintiffs claim that Okla. Stat. tit. 57, §§ 47, 48, 49, 51

and 55 create varying responsibilities upon a district judge over county jails. Specifically, Plaintiffs allege that §§ 47 and 51 create responsibilities upon a district judge to promulgate rules and regulations for county jails. Additionally, Plaintiffs allege that § 49 creates an appearance of impartiality due to the fact that a district judge may request copies of the jail register, as established by § 48. Plaintiffs allege that § 51 creates a responsibility upon a district judge to order that repairs be made to the county jail. Furthermore, pursuant to § 51, the district judge may request a written report concerning the appointment and payment of wages to a jail medical officer. Thus, as they have presented causes of actions regarding the use of mace and a "stand-up cell" in the LeFlore County Jail, Plaintiffs assert that Judge McBee should be disqualifying due to the fact that, through the alleged "responsibilities" placed upon him by the cited statutes, his actions, or failure to take action, have contributed to their alleged injuries.

Plaintiffs' interpretations of the cited statutes are without support and nonsensical. Pursuant to Okla. Stat. tit.

57, §47, the sheriff is in charge of the county jail. Additionally, section 513 of Title 19, Oklahoma Statutes, provides:

> The sheriff shall have the charge and custody of the jail of his county, and all the prisoners in the same, and shall keep such jail himself, or by his deputy or jailer, for whose acts he and his sureties shall be liable.

On the other hand, a district judge has supervision over his respective district court. Okla. Stat. tit. 20, § 120. The statutes outlining the respective duties of a sheriff and district judge, as well as the operation and supervision of county jails, are void of any responsibility of a district judge as to the actions of deputies and jailers, or for the operation of the county jail. In fact, section 192 of Title 74, Oklahoma Statutes, provides that the State Department of Health shall inspect the jails and ensure compliance with the applicable standards.

The relationship between a district judge and the county jail is too tenuous to support Plaintiffs' Application. The mere fact that a district judge possesses the authority to create rules and regulations of county jails, request copies of the jail

register, require repairs to be made to county jails or request written reports concerning the jail medical officer is hardly enough to question Judge McBee's partiality concerning Plaintiffs' lawsuits. In any event, Plaintiffs have failed to present any evidence that Judge McBee has promulgated rules or regulations concerning the use of mace or the "stand-up cell" in the LeFlore County Jail, or that he is otherwise involved in the operation of the jail that would require his disqualification in the underlying lawsuits pursuant to the applicable authority.

CONCLUSION

No federal question has been presented which would support the Court's review of this matter. Even assuming, arguendo, the Court had jurisdiction, Plaintiffs' claim is wholly without merit. Therefore, the real parties in interest, Defendants in the underlying lawsuits, request the Court deny Plaintiffs' Petition for a Writ of Certiorari.

Dated: July 13, 1999

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, admitted to practice before the Supreme Court of the United States October 13, 1998, hereby certifies that on July 13, 1999, three copies of the foregoing Brief in Opposition were served, by certified mail, postage prepaid, to the following:

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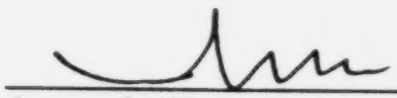

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